No. 78-1844

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
BARBARA BRANDON
MARTIN GREEN
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1844

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18) is reported at 593 F. 2d 299. The opinion of the district court (Pet. Supp. App. SA-1 to SA-23) is reported at 450 F. Supp. 805.

JURISDICTION

The amended judgment of the court of appeals (Pet. App. A-19) was entered on February 20, 1979. A petition for rehearing was denied on March 15, 1979 (Pet. App. A-20). The petition for a writ of certiorari was filed on June 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a source of air emissions that has received a notice of violation under Section 113(a) of the Clean Air Act, 42 U.S.C. 1857c-8(a), may maintain an action to enjoin the Environmental Protection Agency from enforcing the emission limitations that allegedly have been violated.

STATEMENT

Petitioner's three coal-fired electric generating plants are subject to sulfur dioxide and opacity restrictions under the Missouri Implementation Plan, adopted under the Clean Air Act, 42 U.S.C. 1857 *et seq.*,[1] and approved by the Environmental Protection Agency in May 1972 (Pet. App. A-3). Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). Under Section 113(a) of the Act, 42 U.S.C. 1857c-8(a), the EPA notified petitioner in January 1978 that the restrictions applicable to two of the three generating plants were being violated. At the time petitioner received this notice of violation, it was attempting, in administrative proceedings before the Missouri Air Conservation Commission, to secure a variance in the sulfur dioxide standards applicable to its plants.

After receiving the notice of violation, petitioner filed this action in the United States District Court for the Eastern District of Missouri. The complaint sought a stay of any enforcement proceedings that the EPA might conduct, pending completion of the state administrative proceeding in which petitioner was engaged. The district

[1] As a consequence of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, the Act will be recodified at 42 U.S.C. 7401 *et seq.*

court granted the relief requested. The court enjoined the EPA from instituting any enforcement proceeding against petitioner while petitioner was "actively and in good faith pursuing a revision or variance of the sulphur dioxide regulations of the Missouri Implementation Plan in the administrative agencies and/or courts of the State of Missouri" (Pet. Supp. App. SA-23).

While the EPA's appeal from the preliminary injunction was pending, the Missouri Air Conservation Commission granted petitioner's requested variance in the sulfur dioxide standards. A petition to review that variance is now pending in the Missouri state courts.

The variance granted by the Missouri Air Conservation Commission applied only to sulfur standards; petitioner did not seek, and the Commission did not grant, a variance with respect to the opacity standards applicable to petitioner's electric generating plants. Nor did the district court's preliminary injunction stay enforcement proceedings concerning petitioner's alleged violation of the opacity regulations (see Pet. App. A-11 n.5). The sulfur dioxide variance granted by the Commission cannot become effective until approved by the EPA (see Pet. App. A-7 n.2), and the EPA has not yet decided whether to grant such approval.

In September 1978, while the appeal from the preliminary injunction was still pending, the EPA advised petitioner that "notwithstanding any decision by the Eighth Circuit Court of Appeals to vacate the preliminary order of the District Court, the EPA will not initiate any enforcement proceedings against [petitioner] relative to violations of the federally approved sulfur dioxide regulation until EPA, Region VII has informed [petitioner] in writing of its decision regarding a recommended approval or disapproval of the variance,

which would of course be followed by a notice of proposed rulemaking and public comment period" (Reply Br. for the EPA, App. B at 48; see Pet. App. A-16 n.8).

The court of appeals reversed the district court's decision and dismissed petitioner's complaint. The court held that "federal courts should not interfere with the pre-enforcement procedures established by the [Clean Air] Act to obtain compliance" (Pet. App. A-13). The court stated that petitioner's grievances, including any claims of economic and technological infeasibility, could be raised in future enforcement proceedings, but could not provide a basis for enjoining the EPA's enforcement efforts (Pet. App. A-16 to A-17).

ARGUMENT

The decision below is correct and does not conflict with *Ex parte Young*, 209 U.S. 123 (1908). Petitioner has not been deprived of due process and, indeed, the ruling of the court of appeals is unlikely even to cause petitioner any inconvenience. Further review is not warranted.

A notice of violation is the statutorily required first step in a process designed to secure compliance with the emission limitations of the State Implementation Plans promulgated under the Clean Air Act. The sole issue raised in this litigation, and the sole issue decided by the court of appeals, is whether a party receiving a notice of violation is entitled to maintain a suit to enjoin the EPA from proceeding with enforcement of the standards that allegedly have been violated. The court of appeals' decision, that injunctive relief is not available at this early stage of the enforcement process, was correct, for the reasons set forth in the court's opinion.

No question of due process is raised by this case. The State of Missouri has granted a variance in the sulfur

dioxide emissions permissible under the State Implementation Plan, and the EPA's regional office, which must decide whether to recommend approval of the variance, has voluntarily undertaken not to bring any enforcement action against petitioner until that decision is made. If the variance is approved, the EPA will take no further action concerning petitioner's sulfur dioxide emissions (assuming, of course, that those emissions meet the standards set forth in the variance).

On the other hand, if the EPA's regional office recommends disapproval of the variance, then petitioner will remain free to raise its arguments concerning economic and technological infeasibility in any enforcement proceeding that may ensue. Apparently because the EPA retains the power to enforce the emission limitations contained in the State Implementation Plan, petitioner raises the spectre of *Ex parte Young*, *supra*, and contends (Pet. 10-12) that, before it runs the risk of incurring further liability under the Clean Air Act, it is entitled to challenge the validity of the limitations imposed by the Missouri plan. But, as this Court observed in *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976), Congress intended that judicial consideration of claims of economic and technological infeasibility under the Act should occur only when it "will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." The Court suggested that such claims could be resolved most expeditiously before the state agency formulating the implementation plan[2] or on judicial review of the plan and its exemptions in state court (*id.* at 266-267).

---

[2]Missouri law requires the State Air Conservation Commission to use only "practical and economically feasible methods" in controlling air pollution. This limitation covers all the Commission's activities, including its work in devising an implementation plan under the

Here, Missouri law provided petitioner with an opportunity to challenge the State Implementation Plan, but petitioner failed to take advantage of the statutory procedure for obtaining judicial review. See Mo. Ann. Stat. §203.130 (Vernon 1972) and §536.050 (Vernon 1953). *Ex parte Young*, *supra*, is therefore distinguishable; the premise of the Court's holding in that case was that the railroads could not obtain review of Minnesota's rate regulation legislation without violating the statute and thereby risking severe penalties. As the Second Circuit has explained:

> *Young* [and cases following it] * * * establish that one has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties.

Brown & Williamson Tobacco Corp. v. *Engman*, 527 F. 2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

The harshness of the choice confronting the railroads in *Young* is simply not present here. In addition to the opportunity for advance negotiation with the state agency responsible for the implementation plan and in addition to the Missouri statutory procedure for judicial review of the agency's decision, the variance mechanism that

---

Clean Air Act. Mo. Ann. Stat. §203.030 (Vernon 1972). In addition, Missouri law provides that the Commission may adopt no "standard, rule or regulation" without first holding a public hearing in accordance with Mo. Ann. Stat. §203.070 (Vernon 1972).

petitioner has already used and the remedial discretion lodged in the EPA inject ample flexibility into the regulatory scheme. As this Court noted in *Union Electric* v. *EPA*, *supra*, 427 U.S. at 268:

> When a source is found to be in violation of the state implementation plan, the Administrator may, after a conference with the operator, issue a compliance order rather than seek civil or criminal enforcement. Such an order must specify a "reasonable" time for compliance with the relevant standard, taking into account the seriousness of the violation and "any good faith efforts to comply with applicable requirements." §113(a)(4) of the Clean Air Act, as added, 84 Stat. 1686, 42 U.S.C. §1857c-8(a)(4). Claims of technological or economic infeasibility, the Administrator agrees, are relevant to fashioning an appropriate compliance order under §113(a)(4).

Finally, of course, judicial review of the economic and technological feasibility of particular emission limitations may be available in any civil or criminal enforcement action that the EPA chooses to pursue. See *Indiana & Michigan Electric Co.* v. *EPA*, 509 F. 2d 839, 847 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162, 173 (6th Cir. 1973) (both indicating that infeasibility arguments can be considered in enforcement proceedings). See also *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 268 n.18 (explicitly refusing to address the question whether claims of economic or technological infeasibility may be raised as a defense in an EPA enforcement proceeding). Indeed, in *Union Electric* v. *EPA*, *supra*, where petitioner argued that claims of economic or technological infeasibility should be cognizable on review of the EPA's decision to approve a state implementation plan, petitioner conceded that all due process re-

quirements would be satisfied if such claims could be raised as a defense in an enforcement action (Pet. Br. 31 (No. 74-1542)).

The court of appeals' decision in the present case does nothing more than free the EPA to fulfill its statutory obligation to enforce the Clean Air Act. No penalties of any kind have yet been imposed on petitioner, and the court of appeals' ruling does not mean that petitioner's infeasibility arguments cannot be asserted in any future enforcement proceeding that the EPA may conduct. Further review is inappropriate at this stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

JACQUES B. GELIN
BARBARA BRANDON
MARTIN GREEN
Attorneys

AUGUST 1979

DOJ-1979-08